

# A FOOTNOTE TO THE "CONSPIRACY THEORY"

By MARK DeWOLFE HOWE †

MR. GRAHAM'S recent articles in the *Yale Law Journal*<sup>1</sup> have done much to clarify the history and meaning of the due process clause of the Fourteenth Amendment. I do not intend to repeat the story he and others have told, but merely to add a brief footnote to their writings and to call attention to opinions of Chancellor Kent which seem to have been overlooked by those who have written on the history of due process and the position of corporations in our constitutional law.<sup>2</sup> I believe that the opinions in themselves are of considerable interest and that they have the additional importance of being the earliest expression of the attitude of their author. Certainly Kent's place in American legal history gives peculiar significance to his constitutional judgments.

The Council of Revision, established by the New York Constitution of 1777, was composed of the Governor, the Chancellor, and the Justices of the Supreme Court, or any two of them.<sup>3</sup> It was provided that "all bills which have passed the Senate and Assembly shall, before they become laws, be presented to the said Council for their revisal and consideration; and if . . . it should appear improper to the said Council, or a majority of them, that the said bill should become a law of this State, that they return the same, together with their objections thereto in writing, to the Senate or House of Assembly, in whichsoever the same shall have originated, who shall . . . proceed to reconsider the said bill."<sup>4</sup> If two thirds of each house agreed to the passage of the bill, despite the objections of the Council, it should then become law. The only constitutional statement of policy to guide the Council was the recital in the preamble that "laws inconsistent with the spirit of this Constitution or with the public good may be hastily and unadvisedly passed."<sup>5</sup> The Council was abolished by the Convention of 1821,<sup>6</sup> but during the forty-five years

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1. Graham, *The "Conspiracy Theory" of the Fourteenth Amendment* (1938) 47 YALE L. J. 371, 48 YALE L. J. 171. The articles are reviewed in Hurst, *Book Review* (1939) 52 HARV. L. REV. 851. I am greatly indebted to Mr. Graham for valuable suggestions which he generously made after he had read an earlier version of this paper.

2. See, particularly, Corwin, *The Doctrine of Due Process of Law before the Civil War* (1911) 24 HARV. L. REV. 366, 460 [reprinted in 1 *SELECTED ESSAYS ON CONSTITUTIONAL LAW* (1938) 203]; Corwin, *The Extension of Judicial Review in New York* (1917) 15 MICH. L. REV. 281; HENDERSON, *THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW* (1918).

3. N. Y. CONST. OF 1777, § 3.

4. *Ibid.*

5. *Ibid.*

6. The veto power was given to the Governor by Art. 1, § 12 of the Constitution of 1821, which was adopted on December 31, 1822.

of its existence it played an exceedingly important part in the government of the state,<sup>7</sup> and in its numerous opinions may be found constitutional views of extraordinary interest.<sup>8</sup>

James Kent was a member of the Council of Revision from 1798 until its abolition,<sup>9</sup> and, needless to say, took an active part in its work.<sup>10</sup> Some day a detailed study of the Council's opinions will be made; at the present time, however, our concern is only with those opinions which relate to concepts of due process and to the right of corporations, like natural persons, to claim constitutional protection. It so happens that Kent wrote the Council's official opinion in all but one of the cases with which we are concerned, and we have good evidence as to the share he had in framing that opinion as well.

In 1804 the New York legislature passed a law concerning the election of charter officers in the incorporated City of New York.<sup>11</sup> The statute changed the qualifications of electors, and was passed over the objections of the Council of Revision<sup>12</sup> which condemned the act for its failure to recite either that the parties interested had consented to the alteration in the charter or that the change was founded on any strong public necessity. Concluding the Council's objections was the assertion that "it has been considered as a settled and salutary principle in our government, that in all cases where the *ordinary process of law* affords a competent remedy, charters of incorporation containing grants of personal and municipal privileges were not to be essentially affected without the consent of the parties concerned."<sup>13</sup>

In Alfred B. Street's collection of the vetoes of the Council of Revision the editor states that these objections were reported by Justice Kent.<sup>14</sup> The statement seems to be inaccurate. On September 15, 1818, Francis Brown, President of Dartmouth College, wrote to Daniel Webster concerning a conversation which Brown had recently had with Kent.<sup>15</sup> While

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7. See, in general, 1 LINCOLN, CONSTITUTIONAL HISTORY OF NEW YORK (1906) 743-749.

8. The opinions of the Council of Revision are printed in STREET, THE COUNCIL OF REVISION OF THE STATE OF NEW YORK (1859) 201 *et seq.* There appears to be some dispute as to the number of bills to which the Council objected. See LINCOLN, *op. cit. supra* note 7, at 744-745; 2 HOUGH, AMERICAN CONSTITUTIONS (1872) 63.

9. From February 6, 1798, until July 2, 1804, Kent was an associate Justice of the Supreme Court, and from the latter date until February 25, 1814, he was Chief Justice. From 1814 until his retirement in 1823 he served as Chancellor of the State.

10. Of the 82 opinions rendered during Kent's membership on the Council, he appears in Street's volume as the author of 27.

11. Act of April 5, 1804, 3 LAWS OF N. Y. (Webster) 425.

12. See STREET, *op. cit. supra* note 8, at 327.

13. *Id.* at 328 (italics added).

14. *Id.* at 327.

15. The letter is printed in SHIRLEY, THE DARTMOUTH COLLEGE CAUSES (1879) 268-270.

discussing the *Dartmouth College* case, then pending before the Supreme Court of the United States,<sup>16</sup> Kent had shown Brown his record of the proceedings of the Council of Revision on the New York Legislature's Act of 1804. Brown copied portions of the record and sent them to Webster. From that record it appears that at a meeting of the Council on March 31, 1804, the bill was committed to Justice Kent by his associates. He reported objections which included the following: "It has been considered and treated as a settled and salutary principle in our govt. that charters of incor. were not to be essentially affected without due process of law, or without consent of the parties concerned. Nothing but a strong *publick necessity* would justify such an interference."<sup>17</sup> We do not know what other objections Kent had expressed, but we do know that his objections were overruled by all the judges<sup>18</sup> and that the governor was undecided. On April 4 Governor Clinton reported his criticisms of the same bill, to which all assented except Chief Justice Lewis and Justice Spencer, who "non-concurred".<sup>19</sup> The objections reprinted by Street, and which he ascribed to Kent seem, from this testimony of Kent's, quoted by Brown, to have been framed by Governor Clinton. It will be noticed, of course, that the only change of any significance between the quoted objection of Kent and that of Clinton is that the Justice used the phrase "due process of law" where the Governor spoke of "ordinary process of law". Surely Kent was right when he characterized the two opinions as "substantially the same".<sup>20</sup>

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16. *Dartmouth College v. Woodward*, 4 Wheat. 518 (U. S. 1819). The case had been decided by the Supreme Court of New Hampshire on November 6, 1817. 1 N. H. 111 (1817).

17. SHIRLEY, *op. cit. supra* note 15, at 269-270.

18. *Id.* at 270. In addition to Justice Kent the judges present were Chief Justice Lewis, and Justices Livingston, Thompson, and Spencer. It is not unlikely that Kent stated objections similar to those which he had made to the Act of March 8, 1803, increasing the number of wards in New York City. 3 Laws of N. Y. (Webster) 225. Kent had then condemned the law "because, if the alterations contained in the said bill can be made without the consent of the corporation, the charter may with equal right be altered in other particulars . . . And not only this, but every other charter, and every grant from government can be altered or resumed at pleasure, for they all rest upon the same foundation . . . It involves a principle which may lead to the destruction of all the chartered rights and property of the people of this State, for rights and property cease to be of value when the faith of compact does not secure them, and they are held at the will of any man or any set of men whomsoever." Despite these objections, Governor Clinton and Justices Livingston and Thompson had found the law unobjectionable and it had accordingly become law. For Kent's objections, see STREET, *op. cit. supra* note 8, at 423-425; SHIRLEY, *op. cit. supra* note 15, at 269.

19. SHIRLEY, *op. cit. supra* note 15, at 270. Street gives no indication that any member of the Council dissented from the objections which were adopted. *Id.* at 327.

20. *Id.* at 270. Writing in 1836, Kent ascribed the Council's opinion to Clinton, but summarized the objections by saying that "it had become a settled and salutary principle in the government, that charters of incorporation . . . were not to be essentially affected without the consent of the parties, or without *due process of law*" (italics added). KENT, *THE CHARTER OF THE CITY OF NEW YORK WITH NOTES* (1851 reprint) 220.

In our eyes, accustomed to the doctrines of the *Dartmouth College* case, perhaps the most striking aspect of these opinions of Clinton and Kent is negative—their failure to base their objections on the contract clause of the Federal Constitution.<sup>21</sup> Perhaps Kent and Clinton in using the phrases “due process of law” and “ordinary process of law” intended only to refer to general common law principles, but it is not unlikely that they wished to buttress their general disapproval of the statute with vague reference to that clause in the Constitution of 1777 which provided that “no member of this State shall be disfranchised, or deprived of any of the Rights or Privileges secured to the Subjects of this State, by this Constitution, unless by the Law of the Land, or the Judgment of his Peers”,<sup>22</sup> or to those clauses in the Act of January 26, 1787, concerning the Rights of Citizens, which referred to “due process of law”.<sup>23</sup> That Kent was somewhat uncertain as to the correctness of his own opinion is indicated by his statement to Francis Brown that “it was to be considered he made these objns. as a politician, not as a judge; and he was not clear that the doctrine laid down was correct, as applied to corporations for the purpose of govt., etc.”<sup>24</sup>

Another opinion of the Council, delivered in 1807, and this time by Kent himself, once more indicates that at least as a politician, if not as a judge, he believed that corporations were entitled to the vague protection of the “law of the land” clause of the Constitution or the due process clauses in the statutes of the State. On April 3, 1807, an Act came before the Council in which the Regents of Columbia College were

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21. The tendency in early efforts to provide constitutional protection for corporate charters was, of course, to appeal first to the due process and law of the land clauses in state constitutions and second to the contract clause of the Federal Constitution. See Graham, *supra* note 1, at (1938) 48 YALE L. J. 172-173. In 1790, however, Governor Clinton, in objecting to a proposed statute of New York, seemed to consider that corporate charters were contracts which could not constitutionally be impaired. The other members of the Council did not concur. See STREET, *op. cit. supra* note 8, at 416.

22. Constitution of 1777, § 13. Very surely Kent knew in 1804 that Coke and others had identified the Law of the Land clause of Magna Charta with “due process of law.” See 2 KENT, COMMENTARIES (14th ed. 1896) 13.

23. Laws of the 10th Session (2 Jones & Varick) c. 1. Section 2 of the statute provided that “no Citizens of this State shall be taken or imprisoned, or be disseised of his or her Freehold, or liberties, or Free-Custom; or outlawed, or exiled, or condemned, or otherwise destroyed, but by lawful Judgment of his or her Peers, or by Due Process of Law.” Although the phrase “due process of law” appears also in the 3rd, 4th, and 5th sections of the same act in each of those sections its reference was specifically to criminal proceedings. This statute was given a position of importance comparable to that of the Constitution. See Chancellor Kent, in *Gardner v. Village of Newburgh*, 2 Johns. Ch. 162, 165-166 (N. Y. 1816) and his opinion of October 24, 1814, for the Council of Revision, in STREET, *op. cit. supra* note 8, at 377-378.

24. SHIRLEY, *op. cit. supra* note 15, at 269. For a lively account of the political background of the statute, see POMERANTZ, —NEW YORK, AN AMERICAN CITY—1783-1803 (1938) 133-146.

given the power, previously possessed by the Trustees, of filling vacancies in the Board of Trustees.<sup>25</sup> In objecting to the statute, Kent stated that the corporation had been given a "privilege and immunity" in its charter of 1754, and that the College had not consented to the proposed change. Finally, he asserted that "it is a sound principle in free governments . . . that charters of incorporation, whether granted for private or local, or charitable, or literary or religious purposes, were not to be affected without *due process of law*, or without the consent of the parties concerned".<sup>26</sup> He again acknowledged that "legislative interference would be justified by some strong public necessity", but he denied that any such necessity existed in this case. The Assembly refused to pass the Bill over the Council's objection and it did not become law.<sup>27</sup>

Upon the basis of these two opinions it does not seem rash to assert that Kent believed that corporate rights could not constitutionally be altered without due process of law—in other words, without proper proceedings in a court of law.<sup>28</sup> In any case, these previously neglected opinions are of importance and interest as signifying an early effort to make use of the general concept of due process as a protection to corporate interests. The case of *Trustees of the University of North Carolina v. Foy*,<sup>29</sup> decided in 1804,<sup>30</sup> may still be considered the earliest instance in which due process of law was explicitly applied in such a way as to give constitutional protection to vested corporate rights, but it seems almost unquestionable that Kent at approximately the same time was reaching a similar result by a strikingly similar method. Later on, to be sure, he found other ways of giving security to vested rights,<sup>31</sup> but history has shown us that his early suggestions on the Council of Revision, whether political or judicial in character, contained enormous possibilities of growth.

Two other opinions of the Council of Revision, one written in 1806, the other in 1807, are deserving of particular mention. In 1806 a statute was passed by which turnpike commissioners were authorized to order the opening of the toll gate on any road which they judged to be out of

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25. See STREET, *op. cit. supra* note 8, at 344. Governor Lewis and Justice Thompson concurred. Concerning this bill, see Van Amringe, in A HISTORY OF COLUMBIA UNIVERSITY (1904) 85-86.

26. *Id.* at 345 (italics added).

27. It is surprising that in his discussion of the *Dartmouth College Case* with Francis Brown, Kent made no reference to this opinion of the Council's concerning the charter of Columbia College (no mention of it appears in Shirley's volume).

28. Cf. the opinion of Justice Woodworth, March 22, 1821, in STREET, *op. cit. supra* note 8, at 394. See also, Bronson, J., in *Taylor v. Porter*, 4 Hill 140, 146 (N. Y. 1843).

29. 2 Hayw. 310 (N. C. 1804).

30. The same case, as reported in 1 Murph. 58 (N. C. 1805), is there included among the decisions of the June Term, 1805.

31. See, *Dash v. Van Kleeck*, 7 Johns. 477, 499 (N. Y. 1811); *Gardner v. Village of Newburgh*, 2 Johns. Ch. 162 (N. Y. 1816).

repair.<sup>32</sup> Kent found the law to be objectionable in its failure to afford "any guide or limitation to the judgment of the commissioners" or to give to the proprietors of the turnpike an opportunity to be heard or to appeal from the decision of the commissioners.<sup>33</sup> The bill, he said, "vests in these commissioners an arbitrary power over the interest and property of individuals, . . . for the rights vested in the stockholders of a turnpike company, incorporated by law, are as sacred and as much entitled to protection as any other private rights, and the stockholders cannot constitutionally be deprived of them by the mere allegation of a forfeiture, without a trial and conviction of such forfeiture in the ordinary course of justice."<sup>34</sup> Here, of course, Kent was concerned with matters of procedure and not with vested rights, but it is not improbable that he was again thinking of due process of law when he spoke of "the ordinary course of justice". The special importance of the opinion, however, is the method by which the rights of the corporations were now made secure. In the other opinions which I have mentioned Kent gave the municipal and educational corporations themselves direct protection; here the private corporations achieved security derivatively, through the rights of their stockholders.

The last opinion to which I shall refer does not touch upon the concept of due process, but is of equal interest with those which did. On April 6, 1807, there came before the Council for its consideration "An Act to restrain Insurance of Lottery Tickets, and for Other Purposes."<sup>35</sup> In its last section the bill declared it to be unlawful "for any company not incorporated by the laws of this State, or of the United States, or any private individual not residing within this State, to set up and keep within this State, by their agent, or otherwise, any office to insure houses or goods against fire, or vessels or merchandise against maritime losses, and that every such insurance shall be void, and every person receiving any premium therefor shall forfeit double the amount."<sup>36</sup> Kent again wrote the opinion of the Council and condemned the bill as inconsistent with the spirit of the Constitution and the public good. The Assembly refused to pass the bill over the Council's objections. The Chief Justice found the act to be a violation of "the second section of the fourth article of the Constitution of the United States, which declares that 'the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states'. This intercommunity of privilege," said

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32. Act of April 7, 1806, 4 Laws of N. Y. (Webster) 600.

33. See STREET, *op. cit. supra* note 8, at 338. Governor Lewis and Justices Thompson and Spencer concurred.

34. *Id.* at 339.

35. *Id.* at 345.

36. *Id.* at 346. I quote from the Council's summary of the objectionable portion of the bill, not from the bill itself which I believe is not in existence. Governor Lewis and Justice Thompson concurred with the Chief Justice.

Kent, "secured to the citizens of the several States applies to their personal rights and immunities, and among others to the free right to exercise trade and commerce."<sup>37</sup> He said, further, that "if the bill had prohibited all insurance by private individuals or companies, by means of agents, whether the individuals or companies did or did not reside within this State, then there would have been an equality between the civil immunities of the citizens of this and the other States, and the present objection would not have applied."<sup>38</sup> In addition he found the proposed act to be repugnant to the general good as tending to encourage monopoly and to discourage competition.<sup>39</sup>

The bill itself has interest as an indication of the early date at which the legislature was endeavoring to throw around the insurance business a protective franchise.<sup>40</sup> The basis upon which Kent condemned the legislation is, however, of more importance. In 1807 the meaning of the privileges and immunities clause was still uncertain; the effort to apply its provisions to corporate privileges had not begun.<sup>41</sup> Kent, however, with placid assurance held not only that "the free right to exercise trade and commerce" is a privilege of state citizenship,<sup>42</sup> but extended this privilege to foreign corporations. It is possible, of course, that his condemnation of the law was based upon its effect on non-resident individuals and stockholders who wanted to engage in the insurance business in New York. His broad language, however, seems to include corporations among the citizens to whom protection was afforded. Had Kent been pressed to elucidate his opinion he might well have said that it was to the rights of non-resident stockholders in foreign corporations, rather than to the corporations themselves that he was giving constitutional security. Certainly the grounds upon which he had condemned the act concerning turnpikes would have supported such an explanation of his later opinion.

So far as I know, the views of Chancellor Kent in these various opinions were never brought to the attention of those courts which were later presented with similar problems. Perhaps in all of the opinions to which I have referred Kent was speaking more as a politician than as a judge.

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37. *Ibid.* Although the Council's express authority might seem to be limited to the disapproval of bills which were felt to violate the spirit of the State Constitution, there seemed never to be any hesitation in condemning legislation as being inconsistent with the Federal Constitution. See opinions in STREET, *op. cit. supra* note 8, at 290, 318, 333, 377, and 399.

38. *Ibid.*

39. *Id.* at 347.

40. HENDERSON, *op. cit. supra* note 2, at 101-102, mentions statutes of a similar sort, but refers to none as early as this.

41. See Graham, *supra* note 1, at (1938) 48 YALE L. J. 171, 175 *et seq.*

42. Cf. *Corfield v. Coryell*, 6 Fed. Cas. No. 3230 (E. D. Pa. 1823). Mr. Justice Washington there included the "right to trade" among the privileges and immunities of citizenship.

Courts which were anxious to find some handy constitutional formula for the protection of vested rights might, however, have taken the Justice's utterances to be judicial pronouncements. No one can say surely what effect his opinions might have had on other judges, but it is certain that the weight of his reputation would have done much to render his views acceptable. For us, in any case, it is of interest to know that Kent was making effective though perhaps experimental use of due process concepts in behalf of corporations at a time when the full scope of those concepts was scarcely suspected. Moreover, he was probably the first judge to announce that corporations might directly or derivatively obtain the benefits of the privileges and immunities clause of the Federal Constitution.